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NO. _____

UNITED STATES SUPREME COURT

OCTOBER 1984 TERM

JAMES HINTON, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; BENEFITS REVIEW BOARD, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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ATTORNEYS FOR PETITIONER,
JAMES HINTON

I. QUESTION PRESENTED FOR REVIEW

WHETHER A MINER WHO MINES COAL FOR COMMERCIAL PURPOSES ALONG WITH CLAY, WHICH COAL IS SOLD BY SAID MINER AS ADDITIONAL COMPENSATION FROM HIS EMPLOYER AND OTHERWISE PUT INTO THE ECONOMY, IS A "MINER" UNDER THE BLACK LUNG BENEFITS ACT.

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V. JURISDICTIONAL GROUNDS

A. The date of the Judgment of the Sixth Circuit Court of Appeals is March 22, 1985, and

the time of its mandate is April 17, 1985

B. The statutory provision believed to confer on the Court jurisdiction to review the Judgment in question by writ of certiorari is 28 U.S.C. § 1254 (1985)

VI. STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

A. 28 U.S.C. § 1254 (1985)

See Appendix Page A1

B. 30 U.S.C. § 901 (1977)

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C. 30 U.S.C. § 902 (1977)

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D. 33 U.S.C. § 921(c) (1984)

See Appendix Pages A6-A11

VII. STATEMENT OF THE CASE

This is a Petition for Certiorari brought pursuant to 28 U.S.C. § 1254 for review of the judgment of the United States Court of Appeals for the Sixth Circuit dated March 22, 1985, affirming the Benefits Review Board's Decision and Order dated April 9, 1984, denying the Petitioner's application for Black Lung Disability Benefits. The basis for federal jurisdiction in the Sixth Circuit Court of Appeals was 33 U.S.C. § 921(c).

The Petitioner, James Hinton, is a resident of Haldeman, Carter County, Kentucky, who was born on April 10, 1916. (Tr. p. 10.) He has a fourth grade education (Tr. p. 10) and began employment for Kentucky Fire Brick Company at the age of seventeen in 1933 where he was employed in a deep mine as a loader (Tr. p. 11). He was laid off that

job in 1944 after working eleven years for the company and from 1944 to 1974 he worked on odd jobs including two years with the C & O Railroad (Tr. p. 12). The Petitioner then began working for Harbison-Walker Refractories in 1947 in its clay mines (Tr. p. 13). He remained on said job until 1960 when the mines ceased operations.

In both of the above mines there was also a six to fourteen inch seam of coal running with the seam of clay (Tr. p. 14, 15 and 16). In both mines he was required to separate the coal from the clay, bring it out of the mine separately and permitted by the company, as extra compensation, to take the coal and sell it or use it for whatever purpose they might make of it. (Tr. p. 14-16.) The testimony in that regard was corroborated by the testimony of Mr. Arnold Knipp, who

worked with the Petitioner. Mr. Knipp verified that he sold many loads of coal to the Petitioner, who owned a truck and sold coal to his neighbors for heating purposes (Tr. p. 36 and 37).

On February 14, 1977, the Petitioner filed a claim with the U.S. Department of Labor for benefits under the Black Lung Benefits Act. On May 24, 1979, the Office of Workers Compensation Programs, U.S. Department of Labor, issued a notice of Initial Finding in the case, in which the Petitioner was found not to be entitled to benefits. On October 2, 1979, the Petitioner was informed by the claims examiner that the additional evidence submitted was insufficient to overturn the prior denial.

In turn, the Petitioner requested a formal hearing, which was held in Huntington, West Virginia on July 13,

1981. The Petitioner was examined and cross-examined by counsel for the Director, and evidence and arguments were presented by all parties in accordance with applicable law. On September 3, 1981, Administrative Law Judge Virginia Mae Brown rendered a Decision and Order awarding benefits to the Petitioner and made a specific finding relative to his coal mine employment as follows:

> I find that Mr. Hinton worked as a coal miner as defined by the Act and Regulations well in excess of 10 years in a coal mine as defined by the Act and Regulations which would constitute coal production where coal was taken out, separated and taken out of the mines in cars. It was used by the miners or they could sell it which Mr. Hinton testified he pursued this way of making a living as well as mining. See Montel v. Weinberger, 546 F.2d 679 (6th Cir. 1976).

The Director appealed Judge Brown's Decision and Order to the Benefits Review

Board. By decision of April 9, 1984, the Benefits Review Board discarded the findings of fact of the Administrative Law Judge, overturned her decision and denied benefits. The Board's Decision and Order was appealed by the Petitioner and affirmed by the U.S. Sixth Circuit Court of Appeals. In turn, the Petitioner now seeks this Court's review of the Court of Appeal's judgment.

VII. ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

The Petitioner submits that the United States Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be settled by the United States Supreme Court.

The record in the present case establishes that the Petitioner participated in the removal of a six to

fourteen inch seam of coal along with the clay mined for the two companies who employed him. He worked for said companies for more than ten years. Said coal was separated in the mines from the clay and brought out in cars separate from those transporting clay. From there, the miners, including the Petitioner, were allowed by the employer companies, as additional compensation, to keep the coal which they mined and prepared for commercial purposes. In turn, the miners frequently sold the coal among themselves and their families for further use.

Both the Petitioner's testimony and the testimony of the witness, Arnold Knipp, established that the Petitioner not only took his share of the coal mined and prepared, but bought additional coal so mined and prepared for such purposes

from other miners and actively sold said coal in his community for a profit as a commercial enterprise. The Petitioner submits that the foregoing facts, circumstances and purposes demonstrate that the coal coming out of the mine was not treated as gob or waste by the companies or the miners, but was used for commercial purposes as additional compensation and as a means of an additional livelihood.

The Petitioner maintains that such evidence was sufficient, reasonably acceptabl and adequate support for the conclusion that coal extraction, preparation and production for commercial purposes was occurring and was a substantial activity during his eleven years with Kentucky Fire Brick and his thirteen years with Harbison-Walker Refractories. In addition, the same

evidence was uncontradicted and unrefuted at the hearing before Judge Brown. In short, the Petitioner submits that the tests for coverage under the Black Lung Benefits Act, as amended in 1977, were met by the facts and circumstances of his case. Wisor v. Director, Office of Workers' Compensation Programs, 748 F.2d 176 (3d Cir. 1984); Montel v. Weinberger, 546 F.2d 679 (6th Cir. 1976).

Based upon the foregoing, the Petitioner prays that the Supreme Court of the United States grants his Petition for Writ of Certiorari.

Respectfully submitted,

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VIII. APPENDIX.

28 U.S.C. § 1254 (1985) Courts of Appeals; Certiorari; Appeal; Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

30 U.S.C. § 901 (1977) Congressional Findings and Declaration of Purpose

Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease or who were totally disabled by this disease at the time of their deaths; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

30 U.S.C. § 902 (1977) Definitions

For purposes of this subchapter -

(a) The term "dependent" means -

(1) a child as defined in subsection (g) without regard to

subparagraph (2)(b)(ii) a wife who is a member of the same household as miner or is receiving regular contributions from the miner for her support, or whose husband is a miner who has been ordered by a court to contribute to her support, or who meets the requirements of section 216(b)(1) or (2) of the Social Security Act.

The determination of an individual's status as the "wife" of a miner shall be made in accordance with Section 216(h)(1) of the Social Security Act as if such miner were the "insured individual" therein. The term "wife" also includes a "divorced wife" as defined in section 216(d)(1) of the Social Security Act who is receiving at least one-half of her support, as determined in accordance with regulations prescribed by the Secretary, from the miner, or is receiving substantial contributions from the miner (pursuant to a written agreement), or there is in effect a court order for substantial contributions to her support from such miner.

(b) The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine.

(c) The term "Secretary" where used in part B means the Secretary of Health, Education, and Welfare, and where used in part C means the Secretary of Labor.

(d) The term "miner" means any individual who is or was employed in a coal mine.

(e) The term "widow" includes the wife living with or dependent for support on the miner at the time of his death, or living apart for reasonable cause or because of his desertion, or who meets the requirements of section 216(c)(1), (2), (3), (4), or (5), and section 216(k) of the Social Security Act, who is not married. The determination of an individual's status as the "widow" of a miner shall be made in accordance with section 216(h)(1) of the Social Security Act as if such miner were the "insured individual" referred to therein. Such term also includes a "surviving divorced wife" as defined in section 216(d)(2) of the Social Security Act who for the month preceding the month in which the miner died, was receiving at least one-half of her support, as determined in accordance with regulations prescribed by the Secretary, from the miner, or was receiving substantial contributions from the miner, pursuant to a written agreement, or there was in effect a court order for substantial contributions to her support from the miner at the time of his death.

(f) The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare except that such regulations shall provide that a miner shall be considered totally

disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulation shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act.

(g) The term "child" means a child or a step-child who is -
(1) unmarried; and
(2) (A) under eighteen years of age, or (B)(i) under a disability as defined in section 223(d) of the Social Security Act, (ii) which began before the age specified in section 202(d)(1)(B)(ii) of the Social Security Act, or, in the case of a student, before he ceased to be a student; or (C) a student.

The term "student" means a "full-time student" as defined in section 202(d)(7) of the Social Security Act, or a "student" as defined in section 8101(17) of title 5, United States Code. The determination of an individual's status as the "child" of the miner or widow, as the case may be, shall be made in accordance with section 216(h)(2) or (3) of the Social Security Act as if such miner or widow were the "insured individual" referred to therein.

33 U.S. § 921 (1984) Review of Compensation Orders

Effectiveness and Finality of Orders

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions

necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the power which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's

decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments.

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in

whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

(d) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court

determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

Institution of proceedings for suspension, setting aside, or enforcement of compensation orders

(e) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

NO. 84-3299

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES HINTON, PETITIONER vs. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, et al., RESPONDENTS	[Filed Mar 22 1985 John P. Hehman, Clerk] ON PETITION FOR REVIEW OF A DECISION OF THE BENEFITS REVIEW BOARD

Before: CONTIE, Circuit Judge; and PHILLIPS and CELEBREZZE, Senior Circuit Judges.

PER CURIAM. James Hinton petitions for review of a decision of the Benefits Review Board denying benefits under the Black Lung Benefits Act. The principal issue in this case is whether Hinton worked as a coal miner within the meaning of the Act. The Administrative Law Judge held that Hinton's work placed him within the statutory definition of a coal miner,

but the Benefits Review Board reversed this decision. We affirm the decision of the Benefits Review Board.

The material facts of this case are not in dispute. Hinton was born in 1916 and has a fifth grade education. From 1933 to 1944, Hinton worked in a clay mine for the Kentucky Fire Brick Company. Harbison-Walker Refractories employed Hinton as a clay miner from 1947 to 1960. A coal seam ran through both clay mines. The width of the seams varied from six to fourteen inches. Part of Hinton's job was to separate the coal from the clay and remove it from the mine. Neither of Hinton's clay mine employers had any use for the coal. They generally regarded the coal as waste material and allowed employees to take the coal freely.

The Act defines a coal miner as follows:

> The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works on or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

30 U.S.C. §902(d). The term "coal mine" in turn, is also defined:

> For purposes of subchapters II, III, and IV of this chapter, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

30 U.S.C. §802(h)(2). This circuit has characterized the statutory definition of a coal miner as having "two elements; work in a coal mine, or 'situs,' and performing coal extraction or coal preparation work, a 'function' requirement." Southard v. Director, Office of Workers' Compensation Programs, 732 F.2d 66, 69 (6th Cir. 1984) (citing Amigo Smokeless Coal Co. v. Director, Office of Workers' Compensation Programs, 642 F.2d 68 (4th Cir. 1981)).

In Montel v. Weinberger, 546 F.2d 679 (6th Cir. 1976) (per curiam), this court dealt with a case quite similar to the present one. The claimant in that case worked in a clay mine containing a four to eight inch seam of coal. Part of the claimant's work in the clay mine was to separate the coal from the clay. See id. at 680. The court held that the

claimant was not a coal miner within the meaning of the Act:

> We believe that for persons employed in a clay mine to qualify for black lung benefits, coal mining must constitute at least a substantial part of the activity and the exposure.

Id.

Hinton argues that coal mining did constitute a substantial part of his work and that he has therefore met the requirements of Montel. He also argues that the Benefits Review Board exceeded its scope of review in overturning the Administrative Law Judge's decision. As to the latter claim, although the Benefits Review Board does have a limited scope of review of factual matters, see Director, Office of Workers' Compensation Programs v. Rowe, 710 F.2d 251, 254 (6th Cir. 1983), the question involved in this case is not one of pure fact. The

historical facts are not disputed; it is only the legal significance of those facts that is in issue.

The Board relied on the fact that Hinton's employers did not make any economic use of the coal, but simply discarded it. This view is consistent with the Third Circuit's holding in Wisor v. Director, Office of Workers' Compensation Programs, 748 F.2d 176 (3d Cir. 1984). We conclude that an employer's lack of economic interest in coal generated in clay mining is highly relevant in determining whether coal mining was a substantial part of a clay miner's work. See Wisor, 748 F.2d at 179. Considering all the facts in this case, including Hinton's employers' economic disinterest in coal, we hold that the Benefits Review Board correctly determined that coal mining was not a substantial part of

Hinton's work activity and that, therefore, Hinton was not a coal miner within the meaning of the Act.

Accordingly, the decision of the Benefits Review Board is AFFIRMED.

ISSUED AS MANDATE:

April 17, 1985

COSTS: NONE

U.S. DEPARTMENT OF LABOR

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB NO. 81-2005 BLA
OWCP NO. 400-09-1132

JAMES HINTON CLAIMANT-RESPONDENT v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR PETITIONER	)	[Filed as part of the record Apr 9 1984 /s/ Agnes Kurtz, Clerk, Benefits Review Board] DECISION AND ORDER

Appeal from the Decision and Order of Virginia Mae Brown, Administrative Law Judge, United States Department of Labor.

Job B. Turner, III (Wallace, Turner & Trigg), Lexington, Kentucky, for the claimant.

Ronald G. Ray (Donald S. Shire, Associate Solicitor of Labor; J. Michael O'Neill, Counsel for Black Lung Benefits), Washington, D.C., for the Director, Office of Workers'

Compensation Programs, United States Department of Labor. Before: RAMSEY, Chief Administrative Appeals Judge. CLARKE and SMITH, Administrative Law Judges.*

PER CURIAM:

*Sitting as Acting Administrative Appeals Judge pursuant to 20 C.F.R. §801.202(b).

The Director, Office of Workers' Compensation Programs, (Director), appeals from a Decision and Order of Administrative Law Judge Virginia Mae Brown (80-BLA-8622) awarding benefits to James Hinton (claimant), on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). 1/ The administrative law judge found that claimant's clay mine work qualified him as a "coal miner" under the Act, and that medical evidence established eligibility under 20 C.F.R.

§727.203. The Director's only contention on appeal is that claimant is not a "coal miner," and is therefore not entitled to benefits. See 30 U.S.C. §§902(d), 802(h)(2); 20 C.F.R. §§725.101(a)(23), (26), 725.202(a).

Claimant worked in clay mines through which ran seams of coal. The coal had to be separated from the clay in order to extract the clay. The separated coal was referred to as "gob" or waste, and was discarded by claimant's employers "anywhere they could find a place to dump it." Hearing Transcript at 26. Employees were allowed, at no charge, to take discarded coal home for personal use. See Hearing Transcript at 14-27; Director's Exhibits 2, 15, 21. The administrative law judge found that this work constituted work in a coal mine, stating that it involved "coal production"

because coal was "separated and taken out of the mine in cars."

The dispositive issue in this case is whether coal mining constitutes at least a substantial part of the activity of the clay mines. Wisor v. Director, BLR , BRB No. 81-626 BLA (January 12, 1984). As in Wisor, the evidence establishes that claimant did not participate in any substantial coal production. The clay mines produced and sold clay, and the coal that was extracted was merely a discarded by-product of the production of clay. The administrative law judge erred in placing controlling weight on the fact that claimant worked with coal. Congress only intended that the Act cover the coal mining industry, and not every operation in which employees come into contact with industry, and not every operation in

which employees come into contact with coal. Montel v. Weinberger, 546 F.2d 679, 1 BLR 2-16 (6th Cir. 1976). Consequently, no substantial evidence in the record supports the administrative law judge's finding that claimant worked in coal mines. See 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a). We therefore reverse the Decision and Order below.

SO ORDERED.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ David A. Clarke, Jr.
DAVID A. CLARKE, JR.
Administrative Law Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Law Judge

Dated this 9th day of April, 1984.

1/ Although the present case was pending on appeal on January 1, 1982, the effective date of the Black Lung Benefits Amendments of 1981, it appears from the

record before us that the Amendments do not affect the disposition of this case.

SERVICE SHEET

BRB No. 81-2005 BLA:

James Hinton v. Director, Office of Workers' Compensation Programs (Case No. 80-BLA-8622) (OWCP No. 400-09-1132)

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In The Matter Of	
	DATE ISSUED:
JAMES HINTON	September 3, 1981
Claimant	
	CASE NO.:
	80-BLA-8622
v.	
	OWCP NO.:
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS	400-09-1132
Party in Interest	

Job D. Turner, III, Esquire
For the Claimant

Ronald G. Ray, Sr., Esquire
For the Party in Interest

BEFORE: VIRGINIA MAE BROWN
Administrative Law Judge

DECISION & ORDER - AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 et seq. In accordance with the Act, and the regulations issued thereunder, this case was

referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were so totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Huntington, West Virginia, at the Federal Building, on July 13, 1981, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 Code of

Federal Regulations. New Parts 725 and 727 were added to Title 20 on August 18, 1978, and were published in the Federal Register on that date (43 F.R. 36772 et seq.) also New Part 718 was added to title 20 Code of Federal Regulations on March 31, 1980. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. 1/

The findings and conclusions which follow are based upon my observations of the appearance and demeanor of the witnesses who testified at the hearing, and upon analysis of the entire record, argument of the parties, applicable regulations, statutes, and case law precedent.

ISSUES

(1) Whether the claimant is a miner.

(2) Whether the claimant worked at least 10 years in and around one or more coal mines.

(3) Whether the claimant has pneumoconiosis as defined by the Act and Regulations.

(4) Whether the claimant has pneumoconiosis arose out of his coal mine employment and was totally disabled thereby.

(5) What dependent or dependents the claimant has for purposes of augmentation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. James F. Hinton, claimant was born April 10, 1916, and completed his fifth grade education. He married Rita Jennings Hinton on February 22, 1934, and she is his sole dependent for purposes of augmentation. (DX 1)

2. Claimant filed his application for Black Lung Benefits on February 10, 1977. (DX 1)

3. Claimant was certified by Dr. John L. Clay on October 5, 1965, as permanently disabled with a diagnosis of back trouble due to a mine injury - 1943, and osleo arthrutus lumbar asc. by x-ray. (DX-9)

1/The following abbreviations will be used throughout this Decision: Director's, Claimant's, and Employer's Exhibits are DX, CX, EX, respectively: Transcript - TR; Deposition - Dep; Administrative Law Judge - ALJ.

4. Affidavits of Mr. Lester Thomas, Mr. Arnold Williams, Mr. John W. Lunsford and Mr. Allen Conn relating to Mr. Hinton's work in coal mining from 1947 to 1960, (DX 21) were submitted June 9, 1980.

5. Mr. Hinton testified he began loading clay and coal in 1933-34 when coal was counted as gob (TR 26) where clay was separated from coal. He last worked in the mines in 1965.

6. Claimant testified to sleeping problems, smothering, sleeping on one pillow, and trouble breathing while climbing steps.

7. Claimant testified to dusty conditions working in the mines. (TR 19, 25, 32)

8. Arnold Knipp testified he worked with Mr. Hinton three or four years before he quit. Mr. Knipp testified that Mr.

Hinton sold some coal and that he bought some from him.

DISCUSSION

Coal miner is defined in Section 401(d) as an individual who worked in and around a coal mine or a coal preparation facility. I find Mr. Hinton's testimony credible and he testified working in the clay mines both in the earlier part of 1933 to 1944 period and 1947 to 1960 period with substantial exposure to coal dust and that the seam of coal was 4 to 16 inches in width running along with the seam of clay and mined along with it.

I find that Mr. Hinton worked as a coal miner as defined by the Act and Regulations well in excess of 10 years in a coal mine as defined by the Act and Regulations which would constitute coal production where coal was taken out, separated and taken out of the mine in

This the 22 day of July, 1985.

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Supreme Court, U.S.
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No. 85-135

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES HINTON, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the court of appeals erred in ruling that he was not a coal miner eligible for benefits under the Black Lung Benefits Act.

1. Petitioner worked for two clay mine operators, from 1933 to 1944 and from 1947 to 1960. Neither of these operators mined coal for commercial purposes. Rather, they discarded, as a waste byproduct, coal that had been removed from their mines in the process of extracting clay. The clay mine operators allowed their employees to take the discarded coal or "gob" at no charge. Pet. App. A13.

2. Petitioner filed a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, which was granted by an administrative law judge. The ALJ found petitioner to be a coal miner on the ground that petitioner's

work involved "coal production" because "coal was taken out, separated and taken out of the mine in cars" (Pet. App. A32-A33).* The Benefits Review Board reversed, stating that "[t]he administrative law judge erred in placing controlling weight on the fact that claimant worked with coal" (*id.* at A22). The Board explained that "Congress only intended that the Act cover the coal mining industry, and not every operation in which employees come into contact with * * * coal" (*id.* at A22-A23). Because the employers produced and sold clay, and merely discarded coal as waste, the Board concluded that petitioner did not work in a coal mine (*id.* at A23).

The court of appeals affirmed (Pet. App. A12-A18). Noting that the facts were not disputed, the court applied its established test that " 'for persons employed in a clay mine to qualify for black lung benefits, coal mining must constitute at least a substantial part of the activity' " (*id.* at A16, quoting *Montel* v. *Weinberger*, 546 F.2d 679, 680 (6th Cir. 1976)). Relying on *Wisor* v. *Director, Office of Worker's Compensation Programs*, 748 F.2d 176, 179 (3d Cir. 1984), the court remarked that "an employer's lack of economic interest in coal generated in clay mining is highly relevant in

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*The Act defines "miner" as "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. 902(d).

The term "coal mine," in turn, is defined as "an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities." 30 U.S.C. 802(h)(2).

determining whether coal mining was a substantial part of a clay miner's work" (Pet. App. A17). Based on the undisputed facts, the court upheld the Board's determination that petitioner was not a coal miner because "coal mining was not a substantial part of [his] work activity" (*id.* at A17-A18).

3. The court of appeals correctly concluded that petitioner was not a coal miner. Its decision is in accord with its earlier decision in *Montel*, and with the Third Circuit's decision in *Wisor*, the only other court of appeals decisions on this issue. Petitioner raises only a factbound claim that does not warrant further review.

To be eligible for black lung benefits, an individual must have worked in a coal mine. See 30 U.S.C. 902(d) and 802(h)(2) (note*, *supra*). A coal mine is a mine from which coal is extracted for a commercial purpose. The commercial purpose requirement derives from Congress's refusal to make black lung benefits available to workers outside the coal industry. See *Montel*, 546 F.2d at 680-681; *Wisor*, 748 F.2d at 178, 179. Here, the coal extracted along with the clay was discarded by petitioner's employers and thus the extraction of coal was not for a commercial purpose.

Petitioner does not challenge the commercial purpose criterion. Instead, he contends that the court of appeals misapplied the rule in this case, because the coal coming out of the mine "was used for commercial purposes as additional compensation and as a means of an additional livelihood" (Pet. 7). This factual contention does not warrant review by this Court. The extent to which an employee of a clay mine is permitted to use or sell discarded coal for his own financial gain has never been held to be relevant to the determination of whether the employee is a coal miner. In *Wisor*, the court rejected a similar claim, holding that, although "coal taken from the mine was * * * given to the

company's employees for their personal use" (748 F.2d at 177), nevertheless "the extraction of coal as a by-product of clay mining * * * does not bring the activity within the definition of coal mining" (*id.* at 179). Moreover, because the coal mine industry alone funds benefits paid by the Black Lung Disability Trust Fund, by paying an excise tax on coal sold by the producer (see 26 U.S.C. 4121(a) and 9501), "[i]t would create an anomalous situation if employees of a clay mine were permitted to recover benefits from [the] Trust Fund * * *." *Wisor*, 748 F.2d at 179. Therefore, the court of appeals correctly held that, even though petitioner may have used or sold coal extracted from his employers' clay mines, he was not a coal miner under the Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General

FRANCIS X. LILLY
Solicitor of Labor
Department of Labor

AUGUST 1985

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